1950

Monte Moses v. Archie McFarland and Sons : Brief of Respondent

Utah Supreme Court

7548

Case No. 7548

IN THE SUPREME COURT
of the
STATE OF UTAH

MONTE MOSES, doing business as
RANCHO PACKING CO.,

Plaintiff, Respondent,

— vs. —

ARCHIE McFARLAND AND SONS,
a corporation,

Defendant, Appellant

BRIEF OF RESPONDENT

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STATEMENT

This is an appeal by the defendant, Archie McFarland and Sons, a corporation, from a judgment against it entered in the Third District Court of the State of Utah in and for Salt Lake County, for the sum of $2,686.98. The case was tried before the court without a jury upon an amended complaint and an amended answer on a claim by the plaintiff against the defendant for damages on its failure to complete an alleged contract for 30,000 pounds of boneless mutton at 24½c a pound,

to be delivered to the plaintiff by the defendant at the rate of 5,000 pounds a week. But, this 5,000 pound arrangement was later reduced to 3,000 pounds a week.

The defendant delivered only 6,635 pounds and refused to deliver the remaining 23,365 pounds, whereupon the plaintiff, to mitigate damage, went into the open market and purchased the deficit paying 34c plus 2c transportation costs per pound, the going rate, and causing him a loss of $2,686.98, which was the amount of the judgment.

The defendant defended upon the ground that no contract was entered into, and that the only arrangement it had with the plaintiff was an open order; that the purchase of the mutton was made through an agent, D. C. Basolo, from the San Francisco office of the defendant, and that defendant further claims that it had no knowledge of this order and that the same was never confirmed by it and that nothwithstanding the fact that it did deliver some mutton as a result of the arrangement with Basolo, defendant's agent did not enter a contract; and it claims further that the man Basolo is without authority to make any contracts for it.

THE FACTS

It was admitted and the proof showed that the defendant is a wholesale meat packer with its principal place of business in Salt Lake City, Utah, and that it is engaged in selling its products not only in the state of Utah, but outside; and that it had an office in San

Francisco from which traveled some 5 or 6 salesmen, one of whom was D. C. Basolo (R. 84).

The plaintiff, Monte Moses, is an individual doing business under the assumed name of Rancho Packing Company, with his principal place of business in Los Angeles, California, and he is particularly engaged in the manufacture of luncheon meats and, that he does purchase various types of material for his business at various parts of the United States (R. 13).

That on or about the 28th day of October, 1947, plaintiff was called long distance telephone from San Francisco by Basolo and importuned to buy some 30,000 pounds of boneless mutton, which Basolo told the plaintiff was on hand and in the freezer of appellant in Salt Lake (T. 37) at a price of 25c per pound; and within a few days this order of approximately 30,000 pounds of boneless mutton was received by the plaintiff.

At about the same time Basolo then asked the plaintiff if he would be interested in an additional 30,000 pounds of the same type of meat (R. 20) to be delivered at 5,000 pounds a week, but not less than 3,000 (R. 22), and thereupon the plaintiff issued its purchase order number 7001 and sent the original thereof to San Francisco to the McFarland Packing Company, which purchase order is Exhibit "A" and reads as follows:

PURCHASE ORDER

Original

7001 Date 10-28, 1947

To — McFarland Packing Co.
Address — San Fransisco

Please enter our order for the following:
Ship to — Rancho
Address .....

When Ship	How Ship	Terms

Quan.	Description	Price	Unit
30 M	Boneless Mutton	24	½
	5 M per week		

By — Monte

And within a day or two plaintiff received Exhibit "B" which reads as follows:

Archie McFarland & Son
Wholesale Meats and Live Stock
24 California St., San Francisco 11, Cal.
October 29, 1947.

Rancho Packing Co.,
4709 Brooklyn Ave.,
Los Angeles, Calif.

Mr. Monty Moses
Order No. 7001

Gentlemen:

In confirmation of our phone conversation on the above order, we will ship on our reefer rig on its weekly trips to Los Angeles a minimum of 3000 pounds each load until complete or more if you desire.

We have advised the plant that lots of less than 3000 pounds are not desirable because of your production schedule. The delivered price on this order is .24½ per pound.

We thank you for this business and hope that we will have the opportunity of serving you further.

Yours very tuly,

Archie McFarland & Son, Inc.

/s/ D. C. Basolo, District Manager

Under date of the 28th of October and carrying plaintiff's order number 7001 plaintiff received Exhibit "I" which reads as follows:

HOUSE ORDER

Archie McFarland & Son
Wholesale Meats and Livestock

Date 10-28-7

Ship to — Rancho Packing Co.
Address — 4709 Brooklyn Ave., L. A.
Order No.7001
When Ship — as available How ship — truck
Salesman .....Buyer .....Terms .....

Lot	No. Pcs.	Des. of Meat	Wt.	Price	Amt.
	3000 lbs.	Boneless Mutton		24½	

Ship each week in lots of no less than 3000 lbs. More if available.

Immediately thereafter plaintiff received shipments of boneless mutton, but at no time were they as large as the minimum requirement.

On or about January 9, 1948, the plaintiff, Mr. Moses, called the defendant and spoke with Mr. Paul McFarland and his testimony with regard to what was said is as follows:

> "Well, the phone call was in reference to the fact that the shipments were not coming through as placed and this was an appeal on our part to get these fellows to follow through since we were relying on these shipments. We pointed out, I believe, that we had made a deal for shipments of not less than 3,000 pounds and that our needs were 5,000, and it was agreed that 5,000 would be the attempted amount shipped. It might have been that at that time he made some explanation as to his position there, but I also believe that he asked me to check and verify the amounts that had been shipped—some such thing as that. I take that from the fact that I reported to him how much had been shipped and also his answer that there was nothing available at the present time but that he would do all he could to get going on this thing to the best of his ability." (T. 28).

Following that conversation the plaintiff wrote the letter marked Exhibit "C," which reads as follows:

January 9, 1948

Archie McFarland Packing Company,
Salt Lake City, Utah

Gentlemen:

Pursuant to our telephone conversation, I checked to see how much boneless mutton we had received and found of the total amount, we had only received 6,635 pounds, leaving a balance of 23, 365 pounds.

After speaking to you I realize you are tightly pressed and that the conditions in general are difficult; however, while our original agreement, as covered by our Order No. 7001, was for 3,000 pounds minimum per week, we received shipments averaging 1500 pounds per week, the last shipment on November 29 amounting to only 400 pounds.

Since calling this to your attention the other day, I know you are going to get busy to complete this transaction and since doing so, I would like to stress a point toward the 3000 pounds if possible as our shortage of supplies is very acute.

Thank you very much.

Very truly yours,
RANCHO PACKING CO.
Monte Moses

MM:ls

And in reply to that letter under date of January 15, 1948, came Exhibit "D" which reads as follows:

ARCHIE McFARLAND & SON
Wholesale Meats and Live Stock

Salt Lake City 12, Utah
January 15, 1948

Rancho Packing Company
4709 Brooklyn Avenue
Los Angeles 22, California

ATTENTION: Mr. Monte Moses

Gentlemen:

In reference to your letter of January 9, 1948, we will do our utmost to complete transaction of

furnishing boneless mutton as referred to in your letter.

At present, due to conditions beyond our control, it is almost impossible to obtain any mutton to bone or to sell carcass weight. In other words, there are no sheep coming to market, but within the next three or four weeks we expect some producers to start culling their heards and we will get back into production again.

We will do our best.

Yours very truly,

ARCHIE McFARLAND & SON

Paul McFarland

PMc:pa

Following the receipt of Exhibit "D" further shipments of mutton were received by the plaintiff. The price of mutton was going up all the time (T. 33) so that on April 28, 1948, when the mitigation purchase was made the price of boned mutton was 34c plus a 2c per pound transportation cost, making a difference between the 24½ and the 36c of 11½c. Plaintiff was forced to buy this meat because of need for it in the business and the failure of the MacFarland meat to be delivered (T. 33).

Basolo never called on the plaintiff personally. His dealings were all by phone (T. 26).

Plaintiff is a rather large operator, manufacturing luncheon meats but not being a slaughter house was obligated to buy all materials by car from all parts of the country and from local slaughter (T.39). Boneless mutton is part of the base product which totals about

75,000 pounds a week. The plaintiff's supply is bought generally from major packers. Fort Worth and San Antonio are big sources of supply and occasional fill in from Chicago (T. 40). It is always available (T. 41). The material here involved must be economic in price in order to be of any value, and when it is available offerings come from all producers, then it is bought (T. 42).

Plaintiff talked with McFarland (T. 43). Basolo had nothing to do with the deal after the first conversation. All of the later transactions were with McFarland (T. 47, 46). Plaintiffs said to Basolo: "You can send us as little as 3,000 pounds but no less than that." Then Basolo said: "On that basis I will contract with you to meet the operation. We have a truck coming in each week and will drop off 3 to 5,000 pounds each week." Plaintiff then told him that a failure to deliver would be putting plaintiff on the spot because he had opportunities of buying mutton at that price. Bosolo said: "You have already bought our present supply." That was the first shipment which plaintiff received. Then Basolo said: "I will contract with you for another 30,000 pounds. Would you like to enter into a deal with me for 30,000 pounds?" (T. 46).

There was nothing said about whether he had consulted with Mr. McFarland or not. Plaintiff bought 30,000 pounds at a price (T. 47) as reflected on the purchase order, 24½c. Plaintiff had a contract for 30,000 pounds of mutton to be delivered at 5,000 pounds per week on a telephone contract backed up by the documents herein above set forth (T. 48).

This was the second car bought over the telephone with Basolo on which plaintiff issued purchase order Exhibit "A" (T. 49). Plantiff didn't remember how much came, but it came in small lots on a diminishing basis (T. 50). Plaintiff received 2851 pounds of boneless mutton on November 8, 1947, 1200 pounds on November 22, 1947, 1080 pounds on December 6, 1947, and plaintiff bought boneless mutton on the open market but was using up reserve supplies. Plaintiff always kept a supply on hand (T. 51).

Prices started to go up right after this deal was made, and McFarland's attention was called to the fact that he had only shipped a fraction of what Basolo had said he would ship on the telephone conversation. All of it was supposed to be shipped at 24½c a pound and plaintiff testified that that's what he should have paid for it (T. 52).

Plaintiff had had business with McFarland before, but had had no other business with Basolo.

400 pounds of boneless mutton was received on or about November 29, 1947, and 664 pounds of such material was received on the 6th of December, 1947 (T. 53).

McFarland did say that he had no more boneless mutton on hand at the time of the telephone conversation, and plaintiff received Exhibit "D" (T. 56). Plaintiff in his conversation with McFarland did tell him that he had a contract with the firm, and McFarland did not dispute it but he asked for a break because it would be a later date before he could deliver, and he might have said that it would be weeks before he could send any boneless

mutton (T. 57). There was no conversation as to the price over the telephone with McFarland. The price of mutton had gone up between the Basolo conversation and the conversation with McFarland. It was rising 3c at a time at that time, January 15th, it was probably around 28 or 29c (T. 58).

On January 31, 1948, plaintiff received 332 pounds of mutton (T. 59) and probably bought a substantial quantity of pigs feet from Basolo. 5,000 pounds would not be an excessive amount to purchase (T. 50). Plaintiff had no standing order for pigs feet because he had no constant usage on pigs feet, and could have ordered 5,000 pounds (T. 61). Pigs feet are not a vital part of the plaintiff's business and several shipments of pigs feet were delivered probably (T. 62).

In response to a question from defendant counsel:

> "Q. Now at the time you had this conversation with Mr. McFarland on the 9th he told you that he had no knowledge of any contract?
>
> "A. That's not true."
>
> "Q. Well, didn't he tell you that he hadn't received—
>
> "A. He definitely told me that he knew that the deal was made and that he would do his best to consummate it as soon as possible. That he was under pressure right now because his stocks were low, but he was expecting at a later date to be able to fill the obligation. There was no question in his mind at that time.
>
> "Q. Now, just a minute. You were still trying to get Mr. McFarland to fill your order in May and June, weren't you?

"A. Yes, sir, as he promised he would eventually fill this order."

And plaintiff may have bought some amounts of boneless mutton from the market. In the mean time, he was draining his stock against the incoming shipment which would eventually replace the inventories. Might have bought quantities in January from other shippers, however plaintiff thought that he was working his own stock to a lower level than he should. He was using his freezer stock of mutton which was his only basis for stabilizing prices (T. 63).

Never talked to McFarland about Basolo's authority (T. 66). Plaintiff thought there was plenty of meat available in 1947 (T. 67).

Plaintiff does not owe McFarland any money (T. 69).

Exhibit "H-9" says: "Ship each week in lots of no less than 3,000 pounds; ship more if available," and it refers to 7001 which is the number on Exhibit A and B (T. 70). Plaintiff had no acceptance of the first order for 30,000 pounds (T. 71) and non-confirmation is the more common method, and plaintiff was given assurance right on down the line that this mutton would be forthcoming. Had a reserve of mutton on hand all the time. He had an assurance that as soon as the run came on or whatever condition came about that they would fulfill that obligation, and it was only when it was at that time indicated to plaintiff that there was no intention of filling this thing that plaintiff was forced to buy mutton (T. 72) because he was getting dangerously low in supplies and

then made the deal to buy the mutton in Fort Worth, Texas, which is the subject matter of this suit. Usually keep not less than 70,000 pounds on hand (T. 73).

The 30,000 pounds was shipped within a day or two after the order, and Mr. Lees, one of the employees of the company, testified to that effect. The main office of the company is in Salt Lake, and the San Francisco office is a sales office in which Basolo was employed together with 5 other salesmen and his communications with the office in Salt Lake were generally by telephone (T. 85). His instructions were to go out and sell merchandise after he received confirmation from the packing house as to the availability and price. McFarland testified that he had a telephone conversation with Basolo that the Rancho Pack wanted 30,000 pounds of boneless mutton to be shipped immediately, and it was shipped. He also said that Rancho Pack would take another 30,000 pounds (T. 88).

Exhibit "A" could have come into the main office. McFarland didn't know the exact time as there are numerous clerks that could have handled it, but he had no knowledge of it, and he had a telephone conversation with the plaintiff the first part of January (T. 90) and that conversation was to the effect that plaintiff wanted the boneless mutton that he had purchased from Basolo and that he had a contract for it. McFarland's reply was "You had an open order with Basolo for all the boneless mutton that was available as fast as we could accumulate it." (T. 91).

Certain quantities of pigs feet were shipped to plain-

tiff (T. 92). McFarland claimed that they had never accepted an order for 30,000 pounds of boneless mutton to be shipped 5,000 or 3,000 pounds per week. The price of mutton was 29½c in January, 1948 (T. 94). McFarland testified that Exhibit "A" was seen by him the first time late in the spring of 1948, at which time he also saw for the first time Exhibit "B." McFarland told plaintiff that mutton wasn't coming into the market in January, but that they would ship as it became available. The number 7001 is on Exhibit B and Exhibit A. (T 79).

Received letter dated June 9, 1948, from Mr. Miriam and also letter dated June 4, 1948, which is in answer to McFarland's letter of May 27th. Some mutton was priced at more than 24¾ (T. 99). The defendant shipped mutton for 24½ and 25c, and on the day he talked to Moses on the telephone it was 29c. On the 26th of January, 1949, boneless mutton was 33 to 34c, and on the 8th of November, 1947, it was 25½ to 26c and on the 15th day of November it was 25½ to 26c.

If the order was filled it means it was accepted (T. 101), and an order need not be in writing to make a contract (T. 102). Defendant shipped mutton to Moses as it became available and there was not more available until he said he didn't want less than 3,000 pounds, and when he turned it over to his lawyer he cancelled any agreement we had verbally or otherwise (T. 103) and at the time the arrangements were made, whatever they were, Basolo was in the employ of the company in San Francisco (T. 104) as a salesman, and among the things he sold was boneless mutton.

The figures on the invoices are Mr. Speeler's. Basolo was told to go out and try to find a market for merchandise and never oversell defendant's production, and he comes back to the plant for confirmation. This is confirmed by filling the order or rejecting it (T. 108). Usually 2 or 3 days later after a purchaser has made an order, or within a reasonable time, if a salesman finds out the order isn't filled he will go back and try to apologize as is being done most of the time.

ARGUMENT

APPELLANT MADE CONTRACT WITH RESPONDENT FOR 30,000 POUNDS OF BONELESS MUTTON AT 24½¢ PER POUND AND FAILED TO DELIVER THAT QUANTITY.

trial. The plaintiff was the sole witness, and so far as anything important in this case is concerned, the vice president and general manager of the defendant was its only witness. The testimony of the witness Lees has nothing at all to do with the matters in litigation. Most of his testimony was hearsay, and what he did testify to was admitted, that is, the purchase and delivery of the first car of boneless mutton.

Defendant bases most of its argument for reversal of the judgment herein entered upon the ground that agent D. C. Basolo did not have authority to make the contract sued on, and it further attempts in the face of the evidence to dispute knowledge that the contract was entered into, notwithstanding the fact that defendant made delivery under the contract, had information as to the acceptance of the order by Basolo, talked about it with plaintiff, received letters from plaintiff with refer-

ence to the order and also its purchase order number, and wrote letters under signature of its manager assuring delivery of the boneless mutton, the subject matter of the instant case, but asking consideration of plaintiff as to the terms of delivery.

Defendant has filed an extended brief in support of its contention, has cited texts and many cases, a few of which are here referred to. Respondent believes that in the face of the evidence none of these cases is in point.

Defendant has cited texts and various cases: *American National Bank v. Bartlet,* 40 F. 2d, 21 is a case which involved the right of a manager and a stockholder to mortgage the furniture and fixtures of a store to secure a note made some three months previously under the quoted authority "to do what was necessary to keep the business going." The court allowed the note as an unsecured claim, but denied the so-called agent's right to make the mortgage.

Anheuser Bush v. Grovier Starr, 128 F. 2d 146: in this case the general law of agency is approved as stated in the Re-statement of the Law of Agency, Section 49. In the decision it is settled that if the principal manifests to a third person, that the agent is authorized to conduct a transaction here is apparent authority in the agent to conduct it in accordance with the ordinary uses of business and to do the incidental things which accompany the performance of such transaction, unless the third person has notice that the agent's authority is limited.

This case grew out of a contract of employment as a distributor which was arbitrarily cancelled.

Jordon v. Buick Motor Company, 75 F. 2d 447: This case went off on a failure in the pleadings and has nothing to do with agency or agent's authority.

Lester v. Superior Motor Car, 117 F. 2d, 780: Here plaintiff bought a car from defendant on representation that the car was in good condition. This was not so and plaintiff demanded that the contract be lived up to . Defendant contended that "caveat emptor" applied. Trial court said "yes," the Court of Appeals of the District of Columbia said "no" and granted a new trial.

Motor Car Supply v. General Household Utilities Co., 80 F. 2d, 167: Here was involved a distributor's contract which was terminable at will of either party on 30-day's notice. A question of pleading and a demurrer was sustained which was affirmed on appeal.

Dayton Bread Company v. Montana Company, 126 F. 2d, 257: This was a case instituted for damages for breach of contract for the sale of 5000 barrels of flour. Defendant admitted making the contract, but said it was void as a gambling agreement. Salesman sold bread company 250 barrels of flour which were delivered. Same agent a few days later solicited bread company to buy more, and being advised that the defendant had 3000 barrels on hand and had a contract for 15,000 barrels more, enough for ten months. The court held that agent had no authority to make the contract and in the course of the opinion said:

> "It may conceded that the power of an agent is not only that conferred upon him by his commission, but also as to third persons that which he is held out as possessing. The principal is often

> bound by the acts of his agent in excess of or in abuse of his actual authority, but this is only true between the principal and third persons who, believing and having a right to believe that the agent was acting within and not exceeding his authority, would sustain a loss if the act was not considered that of the principal. The rule of law is for the purpose of preventing fraud * * * If however, a third person dealing with an agent knows he is acting under a circumscribed and limited authority and that is in excess of or an abuse of the authority actually conferred, then clearly the principal is not bound."

Georgia Peanut Company v. Famo Products Company, 96 F. 2d, 440: Case involves the California statutes as to what authority to enter into a contract must be written . No such question is involved here.

Wrenn v. Ehrlich, 195 A. 534: Plaintiff sued for difference on furniture price between what his salesman offered and the price he agreed to when seller refused to accept order at a lower price.

McIsaac v. Hale, 132 A. 916: This involved a condition precedent and seems to have no bearing on the case at bar.

Henderson v. Barber, 85 So. 35: This was an action brought by the plaintiff against the defendant for a 5% bonus on an offer to men working 4 months and over. Court held that he was entitled to the bonus even though he didn't know of the offer until after he had completed the period of work.

Smith v. Holingsworth, 96 So. 394: This is an action against faithless agents. Has no bearing here.

Johnson, et al, v. Shook and Fletcher Supply Company, 16 So. 2d, 496: A case involving the hauling of an immense amount of low grade iron ore. Agent who made the contract was superintendent and did the hiring and firing. The evidence showed that it would take a lifetime to haul the ore, and the court said the agent had no authority to make such a contract. In addition, this contract violated the statute of frauds.

Carson v. Bunting, 70 S.E., 923: Was an action for a penalty for violating the laws of North Carolina.

Big Vein Pocahontas v. Browning, 120 S.E., 247: This case involved condition precedent and has nothing to do with this case at bar.

Chessom v. Richmond Cedar Works, 89 S.E., 800: Decides that a wood boss or field manager has not by reason of his employment authority to enter into a contract for the cutting of timber, which contract may possibly last for a period of 20 years and involves many thousands of dollars; and it further decides that for one to sustain such a contract with a wood boss proof of actual authority must be made.

Cosby Hodges Milling Co. v. Riley, 149 So., 612: Here was a suit on a contract for damages for breach of contract found to have no definite termination date. It was exclusive in terms. The court held the contract had no fixed term and was subject to termination at the will of either party, and further that the defendant was not obligated to purchase any of plaintiff's products, and that the contract was bad for lack of mutuality.

California Refining Company v. Producers Refining Company, 76 P. 2d, 533: Involved a contract to refine oil which came from the second party's wells. There was no agreement to deliver any quantity of oil and there was no consideration, and the contract was held bad for lack of such consideration and mutuality.

Campbell v. Gowans, 35 Utah, 268, was a suit for foreclosure. Judgment was for the plaintiff and was reversed.

Western Cooperate v. Colussi, 231 P., 1: Defendant cites this case in connection with his objections to the mitigation judgment. The litigation grew out of a claim on a trade acceptance for $214.50, the making and delivery of which was admitted and against which a counter-claim for damages for contract breach was filed alleging that damages accrued for non-delivery of certain tierces at Cordova, Alaska. A dispute as to facts, the court concluded that the judgment of the trial court was excessive because defendant under the evidence could have bought fish after delivery of tierces for less than the lower court determined.

Jones v. Mutual Creamery, 17 P. 2d, 256 is cited by the defendant on his theory that there could be no ratification of the contract in the case at bar. Here plaintiff sued for damages for the death of a minor child through negligence of the driver of a vehicle whom plaintiff claimed was defendant's employee. There was a failure of proof to establish employment and a non suit was granted and affirmed. No ratification was proved.

With the case of *Floor v. Mitchell,* 80 Utah at page

216, this court considered a contention of a plaintiff where many such cases were submitted as sustaining his position, and disposed of such cited cases by saying:

> "We are of the opinion that these cases clearly state the law applicable to the facts in each particular case. Each of these cases is different from the instant case on the facts and is, therefore, not applicable."

Now a consideration of the evidence before the trial court will be of interest. There is no dispute that Basolo was at least a salesman for defendant working out of its San Francisco office with some five other salesmen. That he was selling defendant's products to the trade and that he had the use of defendant's facilities for such work, such as the company stationery, its telephone service and apparently its office help.

On or about October 28 or 29th, 1947, in his capacity as a salesman and representing the defendant, Basolo called plaintiff on the telephone at Los Angeles and sold him a quantity of defendant's products, among which was some 30,000 pounds of boneless mutton and 5,000 pounds of pigs feet and other material. It is admitted by the defendant that as to this boneless mutton order it had no "written acceptance," but such order was filled in due time and delivery was made.

Either at the same time or the same day and later, salesman Basolo offered and did sell plaintiff another 30,000 pounds of the same item, boneless mutton, at a quoted price of 24½c per pound. It was understood that the material was not immediately in the freezer,

but that it could be delivered by defendant's truck in Los Angeles at the rate of 5,000 pounds per week (T. 46). On this order plaintiff issued its purchase order number 7001 dated 10-28-47, and sent defendant a copy. Under date October 29th, 1947, defendant confirmed the order, Exhibit "B," by Basolo signing himself as district manager of defendant, and under date 10-28-47 on order 7001 was issued Archie McFarland and Sons house order, Exhibit "I," wherein the "when ship" was "as available" by truck, and the instructions added "ship each week in lots of no less than 3,000 pounds, More if available."

It will be noted that McFarland says this purchase order could have come into the office of the company. He didn't know the time, but the clerks there could have handled it (T. 90). Shipment of this boneless mutton began within a short time and while the quantity never quite met the agreed amounts, it was evident that defendant knew it was in a contract with plainiff and was attempting to deliver.

Then the price of the material began to go up. On or about January 9, 1948, after delivery had fallen far below agreed quantities, plaintiff called defendant on the telephone and talked with Paul McFarland, its manager, complaining that the boneless mutton was not coming through as agreed, and McFarland stated that he was delivering on Basolo's order. Here McFarland claims there was some dispute as to whether there was an accepted order for the mutton. As to which witness was telling the truth can be measured by the subsequent

events. Respondent says he had a contract; appellant says it was an open order. Exhibit "C" is clearly written as the result of the phone conversation and just as clearly refers to plaintiff's order 7001 for 3,000 pounds minimum per week and supplies the amount of mutton received and does the arithmetic showing the balance due of 23,365 pounds.

Replying to letter Exhibit "C" under signature of respondent by Paul McFarland comes Exhibit "D" dated January 15, 1948, and if there was any differences between plaintiff and McFarland it certainly does not appear. There is nothing here but a complete agreement that there was a contract for 30,000 pounds of boneless mutton of which there remained 23,365 pounds undelivered, and there is an unequivocal promise "We will do our utmost to complete transaction of furnishing boneless mutton as referred to in your letter."

Up to this point there certainly was no differences of opinion as to what was the obligation and the understanding on the boneless mutton purchased between plaintiff and McFarland, and from here as indicated above the price began to go up and no further sizeable shipments were made to keep his stock intact and within the range of safety according to demands. Thereupon plaintiff went into the market and made a purchase of 23,365 pounds of the mutton and paid 36c a pound therefor, the going price, and notified appellant that he had done so, Exhibit "J" dated May 25, 1948. Responding to Exhibit "J" came the very remarkable Exhibit "E" and on June 4, 1948, Exhibit "L" was sent to defendant and

it will be here seen that even in the face of the failure of performance by defendant, the Rancho people were still willing to accept delivery of the mutton.

Appellant attempts to claim waiver of damage because respondent allowed it to ship smaller amounts. How absolutely unfair is this statement when the evidence shows without dispute that appellant was always claiming difficulty in obtaining the mutton in the agreed quantities and asking for consideration and respondent was patiently and thoughtfully trying to be helpful, but always insisting that delivery be made.

It is clear, also, that questioning the authority of Basolo was a much later theory of defense than that originally contemplated. The first answer to plaintiff's complaint, even, is a general denial. The first information that there was any question about Mr. Basolo's authority came when an amended answer was filed months after the action was instituted and the record will show that McFarland himself had no doubt about his obligation and conceded a contract to deliver the mutton, and he finally concluded, speciously, that respondent's contract was cancelled when he turned the matter over to his lawyer (T. 103).

It is quite clear from all that has transpired in connection with this transaction that if the price of boneless mutton had gone down there would have been no doubt at all in the mind of the appellant but that the engagement entered into by Basolo and talked about by McFarland and Moses over the telephone and written about by McFarland and Moses after the telephone conversa-

tion of January 9, 1948, was a binding and enforceable contract with the Rancho Packing Company would have been compelled to perform; and by an analogy why isn't it just as binding a contract when the price of the mutton went up? Appellant seeks to avoid his responsibility by disclaiming authority upon the part of his qaulified agent and by disclaiming his own statements in writing and the acts of his company in delivering at least a portion of the mutton bought by respondent in October 1947.

Respondent asserts that the evidence in this case justifies the findings and the judgment of the court in every respect. It is difficult to see how the obligation of appellant can be avoided by the subterfuges which are now sought to be the justification of its actions in refusing to comply with the terms of a contract reasonable in all respects, and attempted to be complied with until such time as the price of boneless mutton rose to a place where it saw it might have a financial disadvantage in fully completing the partially fulfilled contract.

The trial court saw and heard the witnesses who testified in this case, was able to weight their testimony, saw their demeanor on the stand, making a judgment as to the respective interests presented, and finally to make its findings of fact and conclusions of law thereon on which the judgment here questioned is based. Judgments of trial courts are not lightly put aside, and this court has repeatedly held that under such circumstances in law actions if the findings and judgment of the trial court are substantially supported by evidence the Su-

preme Court may not disturb them.

Sine v. Salt Lake Transportation Co., et al., 147 Pac. 2d, 875; 106 Utah 278;

In re Knight Estate—Montgomery v. Knight, 141 Pac. 2d, 879, 105 Utah 130;

Glen v. Rich, 147 Pac. 2d 849, 106 Utah 232;

Petty, et al, v. Berg, 150 Pac. 2d 776, 106 Utah 527;

Palfreyman v. Bates and Rogers Construction Co., 158 Pac. 2d, 132; 108 Utah 142;

Tracy-Loan and Trust Co. v. Openshaw Investment Co., 132 Pac. 2d 388, 102 Utah 509.

Respondent insists that there is substantial evidence on all points of difference in the case at bar to justify this court in indulging the presumption that the trial court was correct, and if this be so, the burden of affirmatively showing the error is on the appellant. *Palfrey v. Bates and Rogers Construction Co., supra,* case cited. And we think, on this obligation it has failed.

IT IS RESPECTFULLY SUBMITTED that no prejudicial error was committed in the trial of this case and that the judgment of the trial court should be affirmed.

Respectfully submitted,

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